

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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U.S.A. DAWGS, INC., a Nevada  
corporation,

Plaintiffs,

vs.

CROCS, INC., a Delaware corporation;  
and DOES 1-10,

Defendants,

Case No. 2:14-cv-01461-RFB-PAL

**ORDER**

**I. INTRODUCTION**

Before the Court are Defendant Crocs' Motions to Dismiss. (ECF Nos. 5, 13). The Court has reviewed the parties' pleadings. For the reasons discussed below, Defendants' Motion to Dismiss (ECF No. 13) is granted in part and denied in part. The Court finds that Defendant Crocs' Motion to Dismiss Pursuant to Nev Rev Stat § 41.660 is Dismissed/Denied without prejudice.

**II. BACKGROUND**

Plaintiff USA Dawgs ("Dawgs") filed its Complaint on September 10, 2014. (ECF No. 1). On September 17, 2014, Defendant Crocs ("Crocs") filed a Motion to Dismiss Pursuant to Nev. Rev. Stat. § 41.660. (ECF No. 5). On October 3, 2014, Defendant Crocs filed a Motion to Dismiss pursuant to FRCP 12(b)(6). (ECF No. 13).

1 As an initial matter, Plaintiff argues that “[i]n filing an anti-SLAPP motion (ECF No. 5),  
2 Defendant Crocs has impliedly consented to claim splitting and also waived its right to bring its  
3 present Motion.” (ECF No. 13).

4 Defendant Crocs argue that the Court should exercise its discretion to dismiss Plaintiff  
5 Dawgs's duplicative lawsuit, due to Plaintiff's pre-existing counterclaims in the United States  
6 District Court of Colorado. Mot. Dismiss (ECF No. 13, at 8).

### 7 8 **III. LEGAL STANDARD**

9 In the Ninth Circuit, “the well-established ‘first to file rule,’ [] allows a district court to  
10 transfer, stay, or dismiss an action when a similar complaint has already been filed in another  
11 federal court.” Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 623 (9th Cir. 1991). “The first-to-  
12 file rule may be applied ‘when a complaint involving the same parties and issues has already been filed  
13 in another district.’” Kohn, 787 F.3d at 1240 (quoting Alltrade, 946 F.2d at 625). “[A] court analyzes  
14 three factors: chronology of the lawsuits, similarity of the parties, and similarity of the issues.” Kohn,  
15 787 F.3d at 1240.

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17 Similarity of parties. “Regarding similarity of the parties, courts have held that  
18 the first-to-file rule does not require exact identity of the parties. Rather, the first-to-file  
19 rule requires only substantial similarity of parties.” Id. Similarity of issues. “The  
20 issues in both cases also need not be identical, only substantially similar. To determine  
21 whether two suits involve substantially similar issues, we look at whether there is  
22 ‘substantial overlap’ between the two suits.” Id. at 1240-41.

### 23 **IV. DISCUSSION**

24 Here, Plaintiff argues that the issues in the Colorado and present action are different: “The  
25 Colorado action is primarily a patent infringement case, whereas this action is primarily an antitrust  
26 and unfair business practices case.” Opp. Brief at 10. According to the Plaintiff, the Colorado  
27 counterclaims and Nevada claims are listed below:  
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1           **A.** Colorado counterclaims: (1) declaratory judgment for non-infringement of the '858  
 2           patent; (2) declaratory judgment for non-infringement of the '789 patent; (3) declaratory  
 3           judgment of invalidity of the '858 patent; (4) declaratory judgment of invalidity of the  
 4           '789 patent; (5) declaratory judgment of unenforceability of the '858 and '789 patents;  
 5           (6) monopolization under Sherman Act Section 2; (7) attempted monopolization under  
 6           Sherman Act Section 2; (8) deceptive trade practices; and (9) intentional interference  
 7           with business advantage.

8           **B.** Nevada claims: (1) monopolization under Sherman Act Section 2; (2) attempted  
 9           monopolization under Sherman Act Section 2; (3) violations of Clayton Act Section 3;  
 10          (4) intentional interference with prospective economic advantage; and (5) violations of  
 11          the Nevada Unfair Trade Practices Act. Id.

12  
 13          The Court finds that there is “substantial overlap” between the two cases, and that “the question  
 14          [Dawgs] asks the [] District of [Nevada] to resolve is at the ‘heart’ of the [Colorado] [] action.” Kohn,  
 15          787 F.3d at 1241. This finding is supported by the fact that the only dissimilar claim brought by Crocs  
 16          in the present action is an alleged violation of Section 3 of the Clayton Act. The remaining four  
 17          claims—violations of Section 2 of the Sherman Act, intentional interference with prospective economic  
 18          advantage, and violations of the Nevada Unfair Trade Practices Act—mirror Dawgs’s Colorado  
 19          counterclaims.

20          The Court is unconvinced by Dawgs’s distinction of the current claims as anti-trust claim and  
 21          the Colorado counterclaims patent infringement claims. Facially, Dawgs’s Colorado counterclaims for  
 22          Sherman Act violations (attempted and actual monopolization) belies this argument. Furthermore,  
 23          Dawgs admits that “[t]he crux of Dawgs’ claims for monopolization and attempted monopolization,  
 24          brought under Sherman Act Section 2 (15 U.S.C. § 2), is that Crocs (1) fraudulently procured patents  
 25          from the USPTO by failing to disclose known material, invalidating prior art and (2) initiated bad-  
 26          faith patent infringement litigation intended to secure or preserve an unlawful monopoly.” Opp. Brief  
 27          at 1.

1 The substantial overlap of anti-trust and patent violations is further supported by Dawgs's  
2 Walker Process claim: "Dawgs' first theory of Section 2 liability falls under the Supreme Court's  
3 decision in Walker Process. To allege a Walker Process claim, Dawgs must have alleged that (1)  
4 Crocs obtained its patents by knowingly and willfully misrepresenting facts to the USPTO; (2)  
5 Crocs was aware of the fraud when bringing suit; (3) Crocs intended to deceive the patent examiner;  
6 and (4) Crocs would not have obtained its patent but for the alleged misrepresentations—that is, the  
misrepresentation was material." Id. at 19.

7 The Court finds that Dawgs's own characterization of its Nevada claims as predicated upon  
8 patent infringements undermines the argument that the "patent Colorado case" involves dissimilar  
9 issues. Therefore, the Court finds that the final, "similarity of issues" requirement is met.

## 10 11 CONCLUSION

12 **The Court, having found that the three Kohn factors for the "first to file" test are**  
13 **satisfied, exercises its discretion to transfer the present case to Colorado.**

14 THEREFORE, the Court will not address the Plaintiff Dawg's stipulation that it will dismiss  
its alleged non-compulsory, non-patent counterclaims in the Colorado action. Opp. Brief at 7.

15 Additionally, the Court will not address Defendant Croc Inc's argument that the Court should  
16 dismiss Dawgs's complaint pursuant to FRCP 12(b)(6), for failure to state a claim upon which relief  
17 can be granted.

18 The Court will also not address Defendant Croc Inc's Motion to Dismiss (ECF No. 5)  
19 regarding the barring of Plaintiff Dawg's state law claims under Nevada's anti-SLAPP statute.

20 IT IS ORDERED that Defendant Crocs, Inc.,'s Motion to Dismiss is GRANTED in part and  
DENIED in part. (ECF No. 13).

21 IT IS FURTHER ORDERED that Defendant Crocs, Inc.,'s Motion to Dismiss Pursuant to  
22 Nev Rev Stat § 41.660 is DISMISSED/ DENIED without prejudice. (ECF No. 5)

23 IT IS FURTHER ORDERED that the Clerk of the Court SHALL TRANSFER this above-  
24 entitled action to the Colorado District Court for all further proceedings.

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1 IT IS FURTHER ORDERED that the present action under the above-captioned case SHALL  
2 BE CLOSED by the Clerk of Court.

3 DATED this 28<sup>th</sup> day of September, 2015.

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RICHARD F. BOULWARE, II  
UNITED STATES DISTRICT JUDGE